States Senate, its contracts for press telegraphic service. What is the use of laws prohibiting discriminations and extortions, if the contracts and record which show such discriminations and extortions may be kept secret? How can these offences be discovered? How can they be punished?

CHARLES L. BILLINGS.

Chicago.

United States Circuit Court, District of Rhode Island.

MATHEWSON *v.* PHŒNIX IRON FOUNDRY.

At common law, persons of suitable age might, by words of present consent, contract a valid marriage without the presence and intervention of a minister, and without any particular form of solemnization.

A statute may take away this common-law right, but this is not to be presumed. When the statute regulating marriage is directory merely and does not expressly forbid other marriage contracts, a common-law marriage is valid and entitles the wife to dower on the death of the husband.

Although the early statutes of a state abrogated entirely the common law by making marriages illegal unless conformed to statutory regulations, yet on the repeal of such statutes and the passage of a statute directory merely, the common law is revived.

In this country, where there is no established church and no ecclesiastical court, the common-law marriage is complete and not partial.

If a written contract entered into between the parties in the presence of witnesses, constitutes a valid marriage *per verba de præsenti*, neither the fact that the previous relations of the parties had been unlawful, nor the fact that either party afterwards denied the marriage would destroy the effect of the contract.

BILL in equity to establish the right of complainant to dower in lands occupied by respondents under title derived from complainant's deceased husband. The answer denied the marriage. The case was heard on bill, answer and proofs.

B. F. Butler, *E. M. Johnson* and *E. S. Hopkins*, counsel for complainant.

Brown & Van Slyck and *James Tillinghast*, for respondent.

The opinion of the court was delivered by

COLT, J.—In this suit the complainant claims dower in certain land, as the widow of Henry C. Mathewson, through whom the defendant derived title. As evidence of marriage, she produces the following paper:

"PROVIDENCE, R. I., August 18th 1859.

This is to certify that we, H. C. Mathewson and Sarah D. Mathewson, both of Providence, R. I., do hereby acknowledge ourselves before the following witnesses to be man and wife.

H. C. MATHEWSON,
SARAH D. MATHEWSON.

Signed in the presence of:
C. A. CARPENTER,
S. J. HORTON."

The witness Horton was a clergyman, then residing in Connecticut. Another person, named Connell, swears he was also present when the paper was signed. The defendant denies the legality of the marriage.

The statutes of Rhode Island, in force at this time, contain certain provisions regulating the subject of marriage: Rev. Stat. 1857, ch. 134.

By section seven, any minister or elder domiciled in the state, or either justice of the Supreme Court, may join persons in marriage.

Section nine prohibits any minister, elder or magistrate from joining in marriage any persons unless they shall sign and deliver to such minister, elder or magistrate a certificate setting forth their names, age, color, occupation, &c.

By section eleven a penalty is imposed upon the minister, elder or magistrate who shall join persons in marriage without first receiving such certificate.

By section fourteen the solemnization of marriage is required to be in the presence of two witnesses, at least, besides the minister, elder or magistrate officiating.

Section fifteen permits Quakers, Friends and Jews to marry according to their forms and ceremonies.

Section sixteen requires the parties to any marriage, before celebration, to deliver to the town clerk the certificate mentioned in section nine, under penalty of fine or imprisonment.

It is clear that the complainant was not married in the mode laid down by statute. The minister present was not domiciled in the state. It does not appear that he officiated at the marriage. He only testifies that he signed the paper, and that those whose

signatures appear, signed it. The parties gave no certificate, as required by statute.

But while this marriage was not according to the form of the statute, it was a good contract of marriage, *per verba de præsenti*, or at common law, so called.

Marriage has long since been regarded as a civil contract, the essence of which is consent. *Nuptias non concubitus, sed consensus facit.* This, says Chancellor KENT, is the language equally of the common and canon law, and of common reason: 2 Kent Com. 51.

At common law, as held in this country, and until recently, it would seem as generally understood in England, persons of suitable age might, by words of present consent, contract a valid marriage without the presence and intervention of a minister, and without any particular form of solemnization. A statute may, of course, take away this common-law right, but this is not to be presumed. The right is not conferred by statute, but exists independent of it, and, therefore, it is held the rule does not apply, that when a statute directs a thing to be done in a particular way, it is void if done in any other way. The construction usually adopted is, that when the statute regulating marriage is directory merely, when it does not expressly forbid other marriage contracts, a marriage *per verba de præsenti*, or at common law, is good.

It will be observed that the Rhode Island statute is directory in form. It contains no words making marriage a nullity unless the statutory form is complied with. It nowhere declares that marriages good at common law shall be void. On the contrary, section thirteen says: "Whoever shall be married without duly proceeding as by this chapter is required, shall be fined not exceeding fifty dollars," which implies that marriage may be contracted independent of the statutory form, and that such marriage is not invalid, but that the parties so married shall be liable to a penalty. This provision is in marked contrast with the earlier sections of the chapter, where the statute expressly makes marriages within the prohibited degrees of affinity or consanguinity, and in some other cases, absolutely null and void.

We think a careful reading of the whole statute impresses the mind with the conviction that while the legislature intended to subject to punishment the parties, as well as those officiating, who might fail to observe the statutory provisions, it was not the inten-

tion to make marriages void by reason of non-compliance, and thus subject parties to all the serious consequences which would flow from such a result.

Undoubtedly the legislature could prohibit the exercise of the right of marriage except in the way prescribed by statute. But the question here is, what is the proper rule of interpretation under a statute like that of Rhode Island?

Judge STRONG, in construing a statute of similar character, and speaking for the Supreme Court of the United States, says: "No doubt a statute may take away a common-law right; but there is always a presumption that the legislature has no such intention unless it be plainly expressed. A statute may declare that no marriages shall be valid unless they are solemnized in a prescribed manner; but such an enactment is a very different thing from a law requiring all marriages to be entered into in the presence of a magistrate or a clergyman, or that it be preceded by a license or publication of banns, or be attested by witnesses. Such formal provisions may be construed as merely directory, instead of being treated as destructive of a common-law right to form the marriage relation by words of present assent. And such we think has been the rule generally adopted in construing statutes regulating marriage. Whatever directions they may give respecting its formation or solemnization, courts have usually held a marriage good at common law to be good notwithstanding the statutes, unless they contain express words of nullity:" *Meister* v. *Moore*, 96 U. S. 76, 79. And see the remarks of GRIER, J., in *Hallett* v. *Collins*, 10 How. 174, 181. The weight of authority seems largely to sustain this view: 1 Bishop Mar. & Div., § 283; 2 Greenl. Ev., § 460; 2 Kent Com. 51; Reeve's Dom. Rel. 307; *Hutchins* v. *Kimmell*, 31 Mich. 126, 130; *Pearson* v. *Howey*, 6 Halst. 12; *Hantz* v. *Sealey*, 6 Binn. 405; *Commonwealth* v. *Stump*, 53 Penn. St. 132; *Fenton* v. *Reed*, 4 Johns. 52; *Jackson* v. *Winne*, 7 Wend. 47; *Rose* v. *Clark*, 8 Paige 574; *Starr* v. *Peck*, 1 Hill 270; *Clayton* v. *Wardell*, 4 Comst. 230; *Cheney* v. *Arnold*, 15 N. Y. 345; *O'Gara* v. *Eisenlohr*, 38 Id. 296; *Duncan* v. *Duncan*, 10 Ohio St. 181; *Carmichael* v. *State*, 12 Id. 553; *Graham* v. *Bennet*, 2 Cal. 503; *Estate of McCausland*, 52 Id. 568; *Dumaresly* v. *Fishly*, 3 A. K. Marsh. 368; *Donnelly* v. *Donnelly*, 8 B. Mon. 113; *Londonderry* v. *Chester*, 2 N. H. 268; *Newbury* v. *Brunswick*, 2 Vt. 151. But see *Northfield* v. *Plymouth*, 20 Id. 582;

State v. *Murphy*, 6 Ala. 765; *Potier* v. *Barclay*, 15 Id. 439; *Yates* v. *Houston*, 3 Texas 433; *Patton* v. *Philadelphia*, 1 La. Ann. 98; *Holmes* v. *Holmes*, 6 Id. 463; *Cargile* v. *Wood*, 63 Mo. 501; *Dyer* v. *Brannock*, 66 Id. 391. In a few states it must be admitted the rule is different: *Milford* v. *Worcester*, 7 Mass. 48; *Commonwealth* v. *Munson*, 127 Id. 459; *Denison* v. *Denison*, 35 Md. 361; *Cram* v. *Burnham*, 5 Greenl. 213; *Ligonia* v. *Buxton*, 2 Id. 102; *State* v. *Samuel*, 2 Dev. & Bat. 177, 180; *Bashaw* v. *State*, 1 Yerg. 177; *Grisham* v. *State*, Id. 589; *Dunbarton* v. *Franklin*, 19 N. H. 257.

But it is said that common-law marriages were never considered valid in Rhode Island. The question has not been passed upon by the State Court. The argument is based upon the history of legislation upon the subject, and especially upon the older statutes.

The earliest statute relating to marriage was passed at the first session of the General Assembly ever held in Rhode Island in 1647, and it provided that no other marriages should be held lawful except those contracted according to the form of the statute. The act declares: "No contract or agreement between a man and a woman to own each other as man and wife shall be owned from henceforth throughout the whole colony as a lawful marriage, nor the children or issue so coming together to be legitimate or lawfully begotten, but such as are in the first place with the parents, then orderly published in two several meetings of the townsmen, and lastly confirmed before the head officer of the town, and entered into the town clerk's book." Then follows a penalty against those going contrary to the "present ordinance:" 1 Col. Rec. 187.

By Act of March 17th 1656, parties were required to publish their intention of marriage, and objection to such marriage might be heard before two magistrates, when, if disallowed, it was referred to the "General Court of Tryalls:" 1 Col. Rec. 330.

The Act of May 3d 1665, after condemning the loose observance of the Statute of 1647, orders that act and subsequent acts to be punctually observed, and inflicts an additional penalty of fornication on persons who should presume to marry otherwise or live together as man and wife. The act then proceeds expressly to validate the relations of all such then living within the colony, "that are reputed to live together as man and wife by the common observation or account of their neighborhood:" 2 Col. Rec. 104.

By the Act of 1701, it was ordered that all marriages take place after due publication of intentions, etc,, and a fine was imposed on officers presuming to join persons in marriage without such publication, excepting those married according to the laws, customs and ceremonies of the Church of England, and Quakers. The exception was afterwards extended to Jews. This act was entitled, "An Act for preventing Clandestine Marriages," and this same title we find in the several subsequent revisions of the statutes until the revision of 1857: 3 Col. Rec. 435; Pub. Laws 1663–1745, p. 30; Digest of 1767, pp. 172–175.

By Act of December 1733, settled ministers and elders of every denomination were authorized to join persons in marriage after due publication, and upon receiving certificate. They were required to keep and return to the town clerk a record thereof for registry, and a fine was imposed upon them for marrying without publication: 4 Col. Rec. 4, 490; Pub. Laws 1663–1745, p. 176.

It is claimed that these enactments are controlling, and that they show that common-law marriages were never recognised in Rhode Island. The common law has always existed in Rhode Island, except so far as modified or changed by statute. This is true of marriage, as well as other subjects.

The legislature may have seen fit in early times, to do away entirely with the common law, and to make marriage illegal unless it conformed to the statutory regulations. But if the legislature had at any time repealed all statutes on the subject, the common law would have been revived. And in so far as the legislature has seen fit to change the statute, to make it less restrictive by not declaring all other marriages illegal, as in the earliest enactments in so far it has restored the common-law right. If upon a proper construction of the statute in force, we find the common-law right is not denied, then it still exists, though it may not have existed under former and different statutes. Unless the statute under consideration, upon a proper construction, prohibits marriages *per verba de præsenti*, we do not think we should by implication derived from old statutes decide against their validity. To make marriages void and children illegitimate, by implication, is a serious thing. Because under earlier statutes a marriage not made in conformity therewith may have been invalid we do not feel warranted in implying that such is the proper interpretation of the statute of 1857. We think it safer to hold that in modifying the terms of the

statute the legislature intended to modify the law, and as we have before said, our conclusion is that the statute of 1857 does not make a marriage *per verba de præsenti*, or at common law void, this being the construction put upon similar statutes in most of the states, and in the Supreme Court of the United States.

But it is contended that marriage *per verba de præsenti* was not a full marriage at common law, that it was only a partial marriage, where either party could compel the other to go before the ecclesiastical court and complete the contract *in facie ecclesiæ*.

Whatever view may now be taken in England since the case of *The Queen* v. *Millis*, decided in 1844 (10 Cl. & F. 534), where the House of Lords, upon appeal, were evenly divided on the question, the adjudications in this country from the earliest times have established the full validity of marriages at common law. This is the view taken by the Supreme Court in *Meister* v. *Moore*, and by Chancellor Kent, Judge Reeve, Professor Greenleaf, Judge Cooley and Mr. Bishop. (See authorities before cited.) Partial marriages have never been recognised in this country. We have no Established Church, and no Ecclesiastical Court to which application can be made to complete the contract. Our situation and circumstances would necessarily bring about a modification of the common law as recently expounded by English courts. The proposition that the presence and intervention of a person "in holy orders" is requisite to a valid marriage at common law in this country is contrary to the opinion of our ablest jurists and to a long line of adjudications. It would indeed have seemed strange to our Puritan forefathers if in order to contract a legal marriage, they had been obliged to bring with them a clergyman of the Church of England or of Rome to be present at the ceremony: Bishop Mar. & Div., § 282.

If marriage at common law in this country by words of present consent is valid and complete, then clearly the widow should be entitled to dower: Scribner on Dower, says (vol. i. p. 107), "Under our system of laws it is a solecism in language to speak of a marriage as good for some purposes and not good for all—as a marriage which is not a marriage. And it may be safely said that in those states where the courts already have, or hereafter shall determine, in favor of the validity of private marriages, such marriages will be regarded as being attended with all the civil rights and obligations which, under the ecclesiastical law, flow from a

marriage duly solemnized *in facie ecclesiæ*, and therefore that they confer upon the wife the right of dower."

If the written contract entered into between these parties in the presence of witnesses, one of whom was a clergyman, constitutes, as we hold it does, a valid marriage *per verba de præsenti* it can make no difference if their previous relations were unlawful; nor would the fact that either party afterwards denied the marriage be sufficient to annul the contract.

The defendant derived title from Henry C. Mathewson. The evidence goes to prove that a large part of the land, at the time it was deeded was covered by tide-water, and therefore it is claimed the title was in the state: *Bailey* v. *Burges*, 11 R. I. 330; but this would not apply to the remaining portion, in which we hold the complainant entitled to dower as the lawful widow of Henry C. Mathewson. Rev. Stat. of R. I., 1857, ch. 202, s. 1.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME COURT OF ILLINOIS.[2]

COURT OF ERRORS AND APPEALS OF MARYLAND.[3]

SUPREME COURT COMMISSION OF OHIO.[4]

SUPREME COURT OF WISCONSIN.[5]

BANK.

When not responsible for Stock Certificate fraudulently issued by Cashier.—A. lent money to B. for his own use, and as security for its repayment, and on his false representation that he owned, and had transferred to A. a certificate of stock to an equal amount in a national bank of which B. was cashier, received from him such a certificate, written by him in one of the printed forms which the president had signed and left with him to be used if needed in the president's absence, and certifying that A. was the owner of that amount of stock "transferable only

[1] Prepared expressly for the American Law Register, from the original opinions. The cases will probably appear in 111 U. S. Reports.

[2] From Hon. N. L. Freeman, Reporter; to appear in 109 Ill. Reports.

[3] From J. Shaaf Stockett, Esq., Reporter; to appear in 61 Md. Rep.

[4] From E. L. DeWitt, Esq., Reporter; the cases will probably appear in 40 or 41 Ohio St. Reports.

[5] From Hon. O. M. Conover; to appear in 58 or 59 Wis. Rep.